Supreme Court of the United States

OCTOBER TERM, 1918.

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THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, A CORPORATION; CAROLINE E. PEABODY; AMORY ELIOT, ADMINISTRATOR OF THE ESTATE OF MARY R. PEABODY, DECEASED; S. ELLERY JENNISON AND MARY M. JENNISON, *Appellants*

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF FACTS.

The property of the petitioners as stated by Mr. Justice Hughes in the Peabody case, which was decided in December, 1913, and reported in 231st U. S., 530, consists of about 200 acres of land forming the southern corner of Gerrish Island, the southernmost point on the coast of Maine. It is beautifully diversified by forests, glades, open fields and meadows, with beaches and rocks where it borders on the Atlantic Ocean. It lies about three miles from Portsmouth and has a frontage of more

than a mile on the ocean and on the west it borders on the entrance to Portsmouth Harbor. "Its value consists almost entire in its adaptability for use as a summer resort and it had been improved for this purpose by the erection of a hotel, cottages and outbuildings and pier, by the construction of roads and by the provision of facilities for summer recreation."

Fort Foster, a fortification consisting of three ten-inch guns and two three-inch rapid-fire guns, and which was to be one of the outer line of defences of Portsmouth Harbor, was constructed upon a tract of 70 acres lying north and west of the land in suit and abutting upon it. For this fortification appropriation was made in 1873. In May of that year the land was purchased and the construction of the battery was begun and continued into 1876, when the work was suspended. In 1898 work was resumed and the installation of the batteries completed about June 30, 1901. One of the guns cannot be fired without the shot passing over the petitioners' land.

In 1902 one shot was fired from each of the three guns and no more shots were fired until after the decision of the Peabody case. Shots were fired again in November, 1914, and in August, 1915, and in November, 1915, two of which went over the land of the petitioners.

In the present case there was evidence introduced that a fence was maintained from 1876 to 1902 between high and low water mark, extending the southerly line between the Fort Foster reservation and the petitioners' lands; the time of the erection of the fence not having been proved.

In findings 3, 4 and 5, the value of land and buildings was taken as of November, 1914, and no findings were made of the values in 1902 before the guns were fired.

The Court of Claims dismissed the petition and this appeal was taken.

ARGUMENT.

THE FACTS SHOW THAT THE PETITIONERS' LAND HAS BEEN TAKEN.

In the Peabody case Mr. Justice Hughes said: "It may be assumed that if the Government had installed its battery not simply as a means of defence in war but with the purpose of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise whenever it saw fit in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a taking within the principle of the decision."

It was held, however, that not enough was shown by the firing of the guns once each, to establish the intention of the Government to impose a servitude.

Mr. Justice Hughes towards the end of the opinion said, "That there is any intention to repeat it [*i.e.*, the firing of the guns] does not appear but rather is negatived; there is no showing that the guns will ever be fired unless in necessary defence in time of war."

The question in this case then is, whether the facts show such an intention and that a taking has been made. The firing of the guns in 1902 materially impaired the value of the petitioners' property and the firing in 1914 and 1915 rendered it impossible to do anything further with the property.

The maintenance of the fence from 1876 to 1902 on the southerly line between Fort Foster and the petitioners' land, is of significance as showing that the petitioners and everybody in the neighborhood understood this to be the true boundary line, and nobody knew of the arbitrary division of flats as laid down in *Emerson* v. *Taylor*.

What is of far greater significance is, that while in the Peabody case it was not proved that Fort Foster would be used again as a fort, or that the guns would ever be fired again in time of peace, in this case they were again fired on three different occasions, with the result that the petitioners' property, seriously injured by the firing in 1902, by the firing in 1914 and again in 1915, was irretrievably destroyed as a summer resort.

The contention of the Government that two of the guns can be fired without the shots passing over the land of the petitioners, while true, is not material. The most suitable field of fire is over the petitioners' land and if used in times of peace shots must be so fired in order even properly to test the guns. This was done in 1915.

The Court of Claims' findings and opinion seem to proceed upon the theory that even although the firing of the guns from Fort Foster materially impaired the value of the petitioners' property, yet as they were fired over but a small corner of the land there was no taking of the property; it was at best a taking of an insignificant part of their land, which was of but little value. The attitude of the Court of Claims was shown by its findings of the value of the land and buildings when the guns were fired in 1914, with no finding of the value before the guns were fired in 1902. The logic of their position is, as I said in my brief in support

of the motion to remand, that if the property of the petitioners had been destroyed by the action of the United States, the appellants could recover nothing.

We submit that the facts of this case show conclusively that Fort Foster is intended to be used as a fort and that under the Peabody decision the land has been taken and compensation must be made therefor.

We respectfully submit that the judgment of the Court of Claims should be reversed.

JOHN LOWELL,
FRANK W. HACKETT,

Attorneys for The Portsmouth Harbor Land and Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison.